

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
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Petition of U S WEST )  
Communications, Inc. for Waiver )  
or Alternative Relief to Permit )  
Adjustment to Access Charge Tariff )

CC Docket No. 97-250  
CCB/CPD No. 98-32

**AT&T OPPOSITION TO PETITION FOR WAIVER**

Pursuant to the Commission's Public Notice, DA 98-796, released April 24, 1998, AT&T submits the following comments on the petition filed by U S WEST Communications, Inc. ("U S WEST") seeking a waiver of Section 61.45(d) of the Commission's price cap rules. U S WEST requests that the Commission grant a waiver or declaratory ruling permitting a one-time exogenous cost adjustment to U S WEST's current price cap indices ("PCIs") or, in the alternative, that the Commission permit U S WEST to adjust its tariff to spread this exogenous cost over a six-month period.

In its waiver petition, U S WEST asserts that in its tariff filings implementing the Commission's new access reform rate structure effective January 1, 1998, it did not accurately report its originating and terminating Transport Interconnection Charge ("TIC") volumes. As a result, its TIC rates were allegedly too low. U S WEST further claims that it subsequently became aware of this mistake, and on March 13, 1998, submitted a correction to its access tariff

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recalibrating the rates to what they should have been originally. Subject to suspension and investigation, this correction took effect on March 29, 1998.<sup>1</sup> U S WEST now requests that it be permitted to recover \$30.2 million that it supposedly undercharged its access customers between January 1, 1998 and March 29, 1998.

Allowing an exogenous cost adjustment to correct a rate calculation error is inconsistent with the Commission's rules regarding exogenous treatment. Exogenous adjustments must be due to circumstances beyond the carrier's control, and although U S WEST had to restructure its access tariffs, the calculation error was not beyond its control.

U S WEST also fails to meet the unique circumstances or special hardship standard required for grant of a waiver, because all price cap local exchange carriers ("LECs") were required to restructure their access tariffs. To the extent other LECs had to make subsequent rate adjustments, they did so prospectively.

Clearly, recoupment of past undercharges constitutes prohibited retroactive ratemaking. Nothing in the Access Reform Tariff Investigation Order<sup>2</sup> allows LECs to

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<sup>1</sup> See Order on Tariffs Implementing Access Charge Reform, U S WEST, Memorandum Opinion and Order, DA 98-567 (March 27, 1998).

<sup>2</sup> Tariffs Implementing Access Charge Reform, CC Docket No. 97-250, Memorandum Opinion and Order, DA 97-2724 (December 30, 1997) ("Access Reform Tariff Investigation Order").

retroactively increase rates for issues not included in the investigation. Accordingly, any statements in that Order that rates could perhaps be adjusted upward at the conclusion of the investigation are inapplicable to U S WEST's situation, which is the result of a computation error not challenged in the investigation.

**I. U S WEST'S TIC CALCULATIONS WERE WITHIN ITS CONTROL  
AND THEREFORE CANNOT BE TREATED AS EXOGENOUS.**

Under price caps, a carrier may raise its price cap indices to reflect an "exogenous" cost to the extent that those costs "are not otherwise represented in the formula used to set the PCI and are not within the carrier's control."<sup>3</sup> Clearly, U S WEST's miscomputation of its TIC rates is within its control. Under the Commission's own prior explanations of 'control,' exogenous costs are "in general those costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers."<sup>4</sup> U S WEST confesses that "[t]he flaw that produced the undercharges was at heart just a random

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<sup>3</sup> Tariffs Implementing Access Charge Reform, CC Docket No. 97-250, Order Designating Issues for Investigation and Order on Reconsideration, DA 98-151 (January 28, 1998), para. 6 ("Designation Order") citing 47 C.F.R. § 61.45.

<sup>4</sup> Id., citing Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd. 6786, 6807 (1990) ("LEC Price Cap Order"), modified on recon., 6 FCC Rcd. 2637 ("LEC Price Cap Reconsideration Order"), further recon. dism'd, 6 FCC Rcd. 7482 (1991).

mathematical mistake."<sup>5</sup> U S WEST's ability to accurately report its TIC volumes and correctly calculate its TIC rates was unquestionably within its control. U S WEST's mistake was nothing more than an oversight while developing its originating and terminating TIC rates. Exogenous treatment is therefore unavailable.

**II. U S WEST FAILS TO MEET THE UNIQUE CIRCUMSTANCES OR SPECIAL HARDSHIP STANDARD REQUIRED FOR GRANT OF A WAIVER, BECAUSE ALL PRICE CAP LECS WERE REQUIRED TO RESTRUCTURE THEIR ACCESS TARIFFS.**

Indeed, U S WEST's waiver request does not even meet the threshold standard for grant of a waiver. As the Court of Appeals has admonished, the Commission may not "tolerate evisceration of a rule by waivers."<sup>6</sup> Accordingly, a party seeking a waiver must show "good cause therefore," which the courts have interpreted to require a showing that "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."<sup>7</sup> The Common Carrier Bureau has held that before it can grant a waiver request, it must find that an applicant has "shown such special circumstances as individualized hardship or

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<sup>5</sup> Petition of U S WEST Communications, Inc. For Waiver or Alternative Relief to Permit Adjustment to Access Charge Tariff, CC Docket No. 97-250, April 22, 1998, p. 13 ("U S WEST Waiver Petition").

<sup>6</sup> WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

<sup>7</sup> Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990); WAIT Radio v. FCC, *supra*.

inequity that warrant deviation from the Commission's . . . rules and [that] such deviation better serves the public interest."<sup>8</sup> U S WEST has not even attempted to show any unique hardship or burden from the implementation of the Commission's new access reform rate structure that would not be equally true for any other price cap LEC.

U S WEST states it calculated incorrect access rates because these calculations were done "[i]n the face of a tremendously complicated set of regulatory changes, and during a time when U S WEST's experienced staff were forced to cope with several important regulatory proceedings simultaneously."<sup>9</sup> The burden put on U S WEST's experienced staff is not sufficient grounds for the Commission to grant a waiver request. All price cap LECs went through the same regulatory changes that U S WEST did. However, only U S WEST was unable to accurately account for its originating and terminating TIC volumes.

U S WEST's attempt to compare its waiver request to other waiver requests "in analogous circumstances"<sup>10</sup> granted by the Commission must fail. These other waiver requests were anything but "analogous." The 1995 NYNEX waiver request addressed the Commission's methodology for

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<sup>8</sup> Petition for Waiver of Transport Rate Structure and Pricing Requirements, 9 FCC Rcd. 796, 800 (1994).

<sup>9</sup> U S WEST Waiver Petition, p. 12.

<sup>10</sup> U S WEST Waiver Petition, p. 16.

calculating a downward adjustment to its PCIs. NYNEX showed how the Commission's methodology for calculating this downward adjustment uniquely disadvantaged it as a result of being priced below cap. By contrast, U S WEST has not argued and cannot contend that the Commission's methodology for calculating its originating and terminating TIC rates uniquely disadvantaged it. In fact, none of the waiver requests cited by U S WEST in its petition involve the petitioning company calculating incorrect rates as a result of an oversight or, in U S WEST's words, the result of a "random mathematical mistake."<sup>11</sup> In short, U S WEST has not made the required showing for a waiver.

**III. RECOUPMENT OF PAST UNDERCHARGES CONSTITUTES  
PROHIBITED RETROACTIVE RATEMAKING.**

As the Bureau has acknowledged, it is a "longstanding policy that carriers cannot generally recoup past undercharges by prospective rate increases."<sup>12</sup> This is because, as the Supreme Court has explained, "the company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . shoulder the hazards incident to its actions including not only the refund of any illegal gain but also its losses where its filed rate is found to be

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<sup>11</sup> U S WEST Waiver Petition, p. 13.

<sup>12</sup> 1993 Annual Access Tariff Filings, etc., CC Docket Nos. 93-193, Phase I, Part 2, and 94-65, Memorandum Opinion and Order, DA 97-1326 (June 25, 1997), para. 15.

inadequate."<sup>13</sup> Nothing in the Designation Order changes these policies because the particular aspect of U S WEST's TIC miscalculation was not even at issue in the investigation. Accordingly, any statements in the Commission's Access Reform Tariff Investigation Order (paras. 7-8) that rates could perhaps be adjusted upward at the conclusion of the investigation are inapplicable to U S WEST's situation, which is the result of a computation error not challenged in the investigation.

In fact, there have been numerous rate changes to the LECs' Access Reform Tariff filings since the January 1, 1998 effective date. None of these rate changes were retroactive to January 1 and none of these rate changes involved retroactively recovering under billings. Indeed, U S WEST made a change to its Access Reform Tariff filing as a result of a mathematical error in calculating its USF exogenous adjustment.<sup>14</sup> This filing resulted in an increase of its TIC rates and Multiline Business and PRI-ISDN PICC rates. The filing became effective January 24, 1998, and U S WEST did not retroactively recover past undercharges as a result of its understated TIC rates between January 1 and January 24, 1998.

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<sup>13</sup> Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145, 152-153 (1962).

<sup>14</sup> U S WEST Transmittal No. 890, issued January 20, 1998, effective January 24, 1998.

Moreover, equity requires that U S WEST be denied retroactive recoupment. Under the LEC Streamlined Tariff Filings Order, had U S WEST erroneously inflated its TIC rate and had its tariff taken effect without suspension or investigation, the access customer would not be permitted to recoup the overcharges for the period between the tariff effective date and the adjudication of unlawfulness, even if it had proven that U S WEST's TIC was too high.<sup>15</sup> The aspect of U S WEST's tariff at issue here was permitted to take effect without suspension, and fairness dictates that U S WEST should likewise be bound by the presumption of lawful of its TIC rate. To the extent its TIC was too low, U S WEST may correct its rate going forward, but it may not raise rates to recoup the past undercharges.

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<sup>15</sup> Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, Report and Order, FCC 97-23 (January 31, 1997), para. 20 ("LEC Streamlined Tariff Filing Order").



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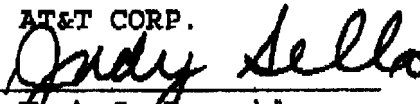
**CONCLUSION**

For the reasons stated above, the Commission  
should deny U S WEST's waiver request.

Respectfully submitted,

AT&T CORP.

By/s/



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May 26, 1998

**CERTIFICATE OF SERVICE**

I, Viola J. Carlone, do hereby certify that on this 26<sup>th</sup> day of May, 1998, a copy of the foregoing AT&T Opposition to Petition for Waiver was served by U.S. first class mail, postage prepaid, to the parties listed below.

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